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Supreme Court, U.S.
FILED
AUG 23 1979
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-112

JAMES H. COUNTRYMAN,
Petitioner,

versus

THE STATE OF TEXAS AND THE
STATE FARM INSURANCE COMPANY,
Respondents.

REPLY OF RESPONDENT, STATE FARM COUNTY MUTUAL INSURANCE COMPANY OF TEXAS, TO PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

Page

Statement 1

Grounds for Opposition of the Petition 3

Certificate of Service 14

LIST OF AUTHORITIES

CASES:

Carroll v. General Medical Company, 53 F.R.D. 349 (D. Neb. 1971) 10

Central States Co-ops. v. Watson Bros. Transp. Co., 165 F.2d 392 (7th Cir., 1948), vacated 337 U.S. 951 7

Dinneen v. Williams, 219 F.2d 428 (9th Cir., 1955) 8

Fawvor v. Texaco, Inc., 387 F.Supp. 626 (E.D. Tex. 1975) 10

Goldsmith v. Sutherland, 426 F.2d 1395 (6th Cir., 1970), cert. den. 400 U.S. 960 7

Hamilton v. Hartford Acc. & Indem. Co., 425 F.Supp. 224 (D.C. E.D. Pa. 1977) 11

Jackson v. Kuhn, 254 F.2d 555 (8th Cir., 1958) 4

James v. Daley & Lewis, 406 F.Supp. 645 (D. Delaware 1976) 9,10

Johnson v. State, 235 S.W.2d 550 (Ga. App. 1977) 13

LIST OF AUTHORITIES (Continued)

Page

Jones v. Landry, 387 F.2d 102 (5th Cir., 1967) ...11

Kenney v. Commissioner of Internal Revenue, 111 F.2d 374 (5th Cir., 1940) 13

Leary v. United States, 268 F.2d 623, 626 (9th Cir., 1959) 4

Lockerty v. Phillips, 319 U.S. 182 (1943) 7

McCartney v. State of West Virginia, 156 F.2d 739, 741 (4th Cir., 1946) 8

McDowell v. United States, 159 U.S. 596, 598-599 (1895) 4

Meicler v. Aetna Casualty and Surety Co., 506 F.2d 732 (5th Cir., 1975) 5

G. C. Merriam Co. v. Syndicate Pub. Co., 237 U.S. 618 (1915) 7

Oskierko v. Southwestern Horizons, Inc., 60 F.R.D. 365 (N.D. Ill. 1973) 10

Poresky, Ex parte, 290 U.S. 30 (1933) 7

Quaker State Dyeing & Finish. Co. v. ITT Terryphone Corp., 461 F.2d 1140 (3rd Cir., 1972) 10

Rex Trailer Company v. United States, 350 U.S. 148 (1956) 13

Skelly Oil Company v. Phillips Petroleum Co., 339 U.S. 667 (1950) 7

LIST OF AUTHORITIES (Continued)

Page

State of New Hampshire v. National Broadcasting Company, 222 F.Supp. 915, aff'd 324 F.2d 506 (1st Cir., 1963) 7

Svejcara v. Whitman, 487 P.2d 167 (N.Mex. App. 1971) 13

Treinies v. Sunshine Mining Co., 308 U.S. 66 (1939) 8

United States v. Barger, 458 F.2d 396 (9th Cir., 1972) 13

Walker v. Bank of America National Trust & Sav. Ass'n, 268 F.2d 16 (7th Cir., 1959), cert. den. 361 U.S. 903, reh. den. 361 U.S. 941 8

UNITED STATES CONSTITUTION:

Article III, Section 2 6,7

STATUTES:

Title 15, United States Code, §1012 5

Title 28, United States Code, §1331 .....2,4,5, 6,7,11

Title 28, United States Code, §1332 ..... 2,4,5,6, 7,9,11

Title 42, United States Code §1983 7

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STATEMENT

TO THE HONORABLE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

This action was commenced on July 19, 1976, by the filing of the Original Complaint by the Petitioner. The

Respondent, State Farm County Mutual Insurance Company of Texas, entered its appearance by filing an answer on August 25, 1976, wherein the Respondent stated as affirmative defenses that the District Court was without subject matter jurisdiction and that the Petitioner's complaint failed to establish jurisdiction under the provisions of Title 28, United States Code, §1331 and §1332. The Respondent, The State of Texas, filed its Motion to Dismiss and Brief in Support of Motion to Dismiss on August 25, 1976, alleging the same grounds for dismissal, together with an attack on the manner in which jurisdiction over the State of Texas had been attempted. Thereafter, the Petitioner filed pleadings in response to the respective motions to dismiss filed by the Respondents, and on June 5, 1978, the District Judge signed an Order dismissing the Petitioner's Complaint. On June 20, 1978, judgment was filed on the basis of the District Court's Order. The Order of the trial court was affirmed by the United States Court of Appeals for the Fifth Circuit on January 17, 1979. From this decision of the Court of Appeals, the Petitioner has filed his Petition for Writ of Certiorari to this Honorable Court.

Except for the pleadings themselves, the briefs submitted in support thereof, and the exhibits attached to such pleadings, no evidence was considered by the District Court by reason of the fact that prior to considering Petitioner's Complaint on the merits, the District Court ruled that it was without subject matter jurisdiction to hear the action alleged in the Petitioner's Original Complaint.

The Respondent, State Farm County Mutual Insurance Company of Texas, would note that in the Petitioner's Brief filed in this Court, in those portions of his brief styled "Statement of the Case", the Petitioner describes in narrative form the allegations of fact which he believes support his cause of action. The Respondent, State Farm County Mutual Insurance Company of Texas, believes that such a dissertation of facts is inappropriate, since the District Court determined the issue of whether or not it had jurisdiction to hear the cause, and finding a lack of jurisdiction, dismissed the case without considering the merits of the factual matters alleged. For this reason, this Respondent does not attempt to reply to or refute any of the fact allegations contained in the Petitioner's Brief.

GROUNDS FOR OPPOSITION OF THE PETITION

A. The District Court properly dismissed the Petitioner's cause of action by reason of the fact that the District Court was without jurisdiction over the subject matter of the claims asserted by Petitioner.

The Petitioner argues that a federal district court is empowered to hear any cause of action asserted by a citizen of the United States. To the contrary, the Constitution of the United States, together with the statutes passed by Congress, unquestionably establish that federal district courts have limited jurisdiction, and a person seeking redress in federal court must invoke jurisdiction under an applicable statute. Those stat-

utes allowing jurisdiction over federal questions and in cases involving diversity of citizenship, to-wit: Title 28, §1331 and §1332 respectively, are constitutional.

The Petitioner has failed to allege an action which permits a District Court to exercise federal question jurisdiction. The Petitioner has failed to plead or show complete diversity of citizenship between himself and both of the Respondents. State Farm County Mutual Insurance Company of Texas is a corporation formed under the laws of the State of Texas and has its principal place of business at Dallas, Texas. The Petitioner, being a citizen of the State of Texas also, lacks diversity of citizenship to bring the instant action. Additionally, the State of Texas shares common citizenship with both the Petitioner and the Respondent, State Farm County Mutual Insurance Company of Texas.

Under both of the foregoing sections of Title 28, United States Code, a litigant must establish that the action is for a sum in excess of $10,000. In the present case, the damages alleged to have been sustained to the Petitioner which are actionable do not exceed the sum of $100.

It is settled beyond any question that federal courts are courts of limited jurisdiction and may not hear actions in the absence of congressional statutes specifically conferring power to adjudicate. *Jackson v. Kuhn*, 254 F.2d 555 (8th Cir., 1958); *Leary v. United States*, 268 F.2d 623, 626 (9th Cir., 1959); *McDowell v. United States*, 159 U.S. 596, 598-599 (1895).

In the instant case, a reading of the Petitioner's pleadings filed in the District Court reveals that his disagreement with the Respondents stems from the operation of Texas state statutes and regulations pertaining to automobile insurance. Under the terms of the McCarran-Ferguson Act, and specifically §1012 of Title 15, United States Code, the right to regulate the business of insurance is reserved to the several states, including Texas. Accordingly, there is no federal question jurisdiction which authorizes the District Court to entertain the merits of the Petitioner's claim, and dismissal was appropriate and proper. *Meicler v. Aetna Casualty and Surety Co.*, 506 F.2d 732 (5th Cir., 1975).

In the Petitioner's Original Complaint (Record, 2-13), the Petitioner alleged generally that jurisdiction was invoked by reason of federal question jurisdiction and diversity of citizenship (Record, 2-3). In a later pleading, to-wit: Amendment to Original Complaint, made a part of the record by the letter order of the Clerk of the Fifth Circuit filed on August 25, 1978, the Petitioner contests the constitutionality of Title 28, United States Code §1331 and §1332.

Section 1331, Title 28, United States Code, provides in pertinent part:

> "(a) The district courts shall have original jurisdiction of all civil actions wherein the amount in controversy exceeds the sum or value of $10,000, exclusive of interest and

costs *and arises under the constitution* [or] *laws . . . of the United States.*" (Emphasis added)

Section 1332, Title 28, United States Code, provides in pertinent part:

> "(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and is between — (1) citizens of different states;"

Petitioner implies that he has an absolute right to bring his action in federal court and that the limitations imposed by §1331 and §1332, respectively, violate constitutional rights. However, it is abundantly clear from the provisions of Article III of the United States Constitution that the scope of lower federal courts' jurisdiction is left to Congress. It is likewise clear from the provisions of Article III, Section 2, of the United States Constitution, that suits between parties who are citizens of the same state are not within the jurisdiction power conferred by the framers of the Constitution. If any question exists from the terms of the Constitution itself, the case law establishing the constitutionality of the foregoing federal statutes pretermits any further argument.

The limiting jurisdiction requirements of §1331 itself do not constitute an abridgement of con-

stitutional rights. *Goldsmith v. Sutherland,* 426 F.2d 1395 (6th Cir., 1970), cert. den. 400 U.S. 960; *Skelly Oil Co. v. Phillips Petroleum Co.,* 339 U.S. 667 (1950); *Lockerty v. Phillips,* 319 U.S. 182 (1943).

The constitutionality of the provisions of §1332 is not open to question in light of the provisions of Article III, Section 2, of the United States Constitution and the case law of the federal courts. *State of New Hampshire v. National Broadcasting Company,* 222 F.Supp. 915, aff'd 324 F.2d 506 (1st Cir., 1963); *Central States Co-ops. v. Watson Bros. Transp. Co.,* 165 F.2d 392 (7th Cir., 1948), vacated 337 U.S. 951.

(1) Petitioner's pleadings are insufficient to invoke District Court jurisdiction under the provisions of §1331 — Federal question jurisdiction.

Petitioner's boot-strap efforts to invoke §1331, federal question jurisdiction, by attaching the constitutionality of §1331 itself, as well as the provisions of §1332, are patently frivolous. No federal question is presented where the issue has been raised in prior litigation and has been resolved against the position asserted by a current litigant. *Ex parte Poresky,* 290 U.S. 30 (1933); *G. C. Merriam Co. v. Syndicate Pub. Co.,* 237 U.S. 618 (1915).

In this contractual dispute, the off-hand suggestion of federal jurisdiction under 42 U.S.C. §1983, is on its face merely colorable and for the purpose of obtaining a

federal forum. " . . . the federal question . . . must be real and substantial, not colorable or frivolous. . . . Mere references to the federal Constitution, laws or treaties and mere assertions that a federal question is involved are not sufficient to confer jurisdiction." *McCartney v. State of West Virginia*, 156 F.2d 739, 741 (4th Cir., 1946). See also *Dinneen v. Williams*, 219 F.2d 428 (9th Cir., 1955).

(2) Petitioner's pleadings are insufficient to invoke the District Court's jurisdiction under the provisions of §1332 — Diversity of Citizenship.

In the instant appeal, Petitioner brought suit against Respondents whom he denominated in his complaint as "The State of Texas" and "The State Farm Insurance Company".

In order for "diversity" to exist as a basis for federal court jurisdiction, there must be a complete diversity of citizenship of the parties; that is, the Petitioner cannot be a citizen of the same state as any of the Respondents. *Treinies v. Sunshine Mining Co.*, 308 U.S. 66 (1939); *Walker v. Bank of America National Trust & Sav. Ass'n.*, 268 F.2d 16 (7th Cir., 1959), cert. den. 361 U.S. 903, reh. den. 361 U.S. 941.

Petitioner alleges that the Respondent, The State Farm Insurance Company, has its "legal residence" in the State of Illinois (Record, p. 3). However, as an Exhibit to his original complaint, Petitioner attached a

copy of his automobile insurance policy which is at issue, which clearly reflects the issuing company to be State Farm County Mutual Insurance Company of Texas, with its home office in Dallas, Texas (Record, pp. 14-21). The identity of the Respondent is again reflected in Exhibit "F" attached to Petitioner's complaint (Record, p. 28). The residence of Respondent as being the State of Texas is further established by the brief of The State of Texas, entitled "Brief in Support of Defendant's [Respondent's] Motion to Dismiss (Record, p. 45 et seq, at p. 52), wherein it reflects that State Farm County Mutual Insurance Company of Texas is incorporated in Texas with its principal place of business being in Dallas, Texas.

Petitioner's complaint is deficient on its face to invoke diversity jurisdiction because it fails to allege both "citizenship" and "principal place of business" of the Respondent, The State Farm Insurance Company, as being in a state other than Texas.

Since §1332(c) of Title 28, United States Code, expressly states that a corporation is both a citizen of the state in which it has been incorporated and the state where it has its principal place of business, both must be alleged in order that the Court can determine if there is complete diversity of citizenship.

As the Court stated in *James v. Daley & Lewis*, 406 F.Supp. 645 (D. Delaware 1976), at page 647:

> "The complaint's jurisdictional allegations of diversity are also insufficient with respect to the corporate plaintiffs without an allegation as to their state of incorporation *as well as* to the state in which each has its principal place of business." (Emphasis added)

See also: *Oskierko v. Southwestern Horizons, Inc.*, 60 F.R.D. 365 (N.D. Ill. 1973); *Fawvor v. Texaco, Inc.*, 387 F.Supp. 626 (E.D. Tex. 1975); and *Carroll v. General Medical Company*, 53 F.R.D. 349 (D. Neb. 1971).

If it be assumed for the sake of argument that State Farm County Mutual Insurance Company of Texas is a subsidiary of a parent company with principal offices in the State of Illinois, Petitioner has still failed in his attempt to invoke "diversity jurisdiction".

Where a subsidiary corporation is incorporated as a separate entity, it is considered to have its own principal place of business for purposes of federal diversity jurisdiction and the separate place of business of the subsidiary is recognized in determining diversity, even though a parent corporation exerts a high degree of control. *Quaker State Dyeing & Finish. Co. v. ITT Terryphone Corp.*, 461 F.2d 1140 (3rd Cir., 1972).

It is Petitioner's burden to prove all facts in support of diversity jurisdiction, and in the instant case where the Petitioner's own exhibits clearly establish that the Respondent insurance company is incorporated in Tex-

as and maintains its principal place of business in Texas, Petitioner has not met his burden and the District Court properly dismissed Petitioner's action.

Additionally, since the other named Respondent, The State of Texas, is a citizen of Texas, it necessarily follows that "complete diversity" as required by §1332 is lacking.

(3) Petitioner's pleadings are insufficient to establish the jurisdictional amount in controversy to invoke jurisdiction under either §1331 or §1332.

Petitioner's original complaint alleges as damages that by reason of the alleged conduct of the two Respondents, he has been required to pay automobile insurance premiums over a three-year period, which have been increased at the rate of $16.33 per annum over his former premiums (Record, p. 13). In an attempt to satisfy the jurisdiction requirements of the respective statutes, Petitioner sues for "compensatory and exemplary damages" in the sum of $150,000.

A federal district court is not bound by the pleadings, but may fairly examine the causes of action alleged to determine whether the complaint asserts an actionable claim for damages in excess of $10,000. *Hamilton v. Hartford Acc. & Indem. Co.*, 425 F.Supp. 224 (D.C. E.D. Pennsylvania 1977). In the instant case, notwithstanding the Petitioner's subjective state of mind, as a legal certainty his claim does not exceed the sum of $10,000. *Jones v. Landry*, 387 F.2d 102 (5th Cir., 1967).

B. The imposition of an increased annual premium for automobile insurance does not constitute a violation of the "Double Jeopardy" clause of the Fifth Amendment to the Constitution of the United States.

As an alleged basis for federal jurisdiction, Petitioner seeks to bring to bear the "Double Jeopardy" provisions of the Fifth Amendment in considering the propriety of the imposition of a 15% increase in annual premiums.

Mr. Countryman's attempt to categorize a rate increase under the terms of a civil contract as being synonymous with the double jeopardy prohibition of the Fifth Amendment is wholly without merit when viewed in light of the express terms of the Amendment, to-wit: ". . . nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb". The simple answer is that he has only been prosecuted criminally for the offense of speeding one time.

The Fifth Amendment does not forbid or even purport to consider civil consequences which may flow from criminal convictions.

State Farm County Mutual Insurance Company of Texas has been unable to find any case which considers the question of premium increases based upon traffic violations under the provisions of the Fifth Amendment. However, there are numerous cases, both state and federal, which hold that a criminal conviction does not bar subsequent civil proceedings arising out of the same transaction or course of conduct.

In suits for civil damages brought by the federal government, the federal courts have consistently held that the civil actions were not precluded notwithstanding that the civil actions were bottomed on the same transactions for which the appealing parties were criminally convicted. See *Rex Trailer Company v. United States*, 350 U.S. 148 (1956), permitting recovery under the Surplus Property Act; *Kenney v. Commissioner of Internal Revenue*, 111 F.2d 374 (5th Cir., 1940), permitting recovery of civil penalties under the Internal Revenue Code; *United States v. Barger*, 458 F.2d 396 (9th Cir., 1972), permitting civil forfeiture of criminal bond.

The same result obtains in state court decisions reviewing state judicial or administrative proceedings. See *Svejcara v. Whitman*, 487 P.2d 167 (N.Mex. App. 1971); *Johnson v. State*, 235 S.W.2d 550 (Ga. App. 1977).

Clearly, if actual civil proceedings are authorized and are not in conflict with the Fifth Amendment, it is beyond question that a premium adjustment to a policy of insurance which the Petitioner, as a party thereto, was free to either accept or reject, is equally invulnerable to a Fifth Amendment attack.

PREMISES CONSIDERED, Respondent, State Farm County Mutual Insurance Company of Texas, prays that the Petition be in all things denied.

Respectfully submitted,

Harrell Feldt

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Of Counsel

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the within and foregoing reply has been served on Petitioner by depositing three copies of the same in the United States mail, postage prepaid, addressed to:

James H. Countryman
214 West Fifth, Room 204
Odessa, Texas 79761

Dated this ____ day of August, 1979.

Harrell Feldt